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No. 82-743

In the Supreme Court of the United States

October Term, 1982

LINCOLN CREDIT CO., et al.,
Appellants,

vs.

GEORGE PEACH, Circuit Attorney of the City of St. Louis, Missouri, et al.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF MISSOURI

MOTION OF APPELLEES PEACH & ASHCROFT TO AFFIRM OR DISMISS

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TABLE OF CONTENTS

Table of Authorities i

Statement of the Case 1

Argument 4

Conclusion 12

Appendix:

Appendix A—Missouri Supreme Court Opinion, July 6, 1982 ..... A-1

Appendix B—§ 408.096, RSMo Supp. 1979 ..... A-17

Appendix C—§ 408.095, RSMo Supp. 1979 ..... A-18

TABLE OF AUTHORITIES

Adams v. Tanner, 244 U.S. 590, 37 S.Ct. 662, 61 L.Ed. 1336 (1917) (Brandeis, J. dissenting) 9

Allen v. Newton, 219 Mo.App. 74, 266 S.W. 327 (K.C. 1924) 6

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107 (1930) 11

Connally v. General Const. Co., 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322 (1926) 7, 10

Ferguson v. Skrupa, 372 U.S. 726, 83 S.Ct. 1028, 10 L.Ed.2d 93 (1963) 4

Gerasta v. Hibernia National Bank, 411 F.Supp. 176 (E.D. La. 1976) 7

Manning v. Princeton Consumer Discount Co., 533 F.2d 102 (3rd Cir. 1976) 7

McGowan v. Maryland, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961) 4, 8, 9

School District of Kansas City v. Smith, 111 S.W.2d 167 (Mo. 1937) 11

State v. Sargent, 241 Mo.App. 1085, 256 S.W.2d 265 (Mo.App., St.L.D. 1953) 6
Thompson-Starrett Co. v. Masons' Administrator, 304 Ky. 764, 201 S.W.2d 876 (1946) 7
Union Mortgage Banking & Trust Co. v. Hagwood, 97 F. 360 (D.S.C. 1899) 7
United States v. Carolene Products Co., 304 U.S. 144, 58 S.Ct. 778, 82 L.Ed. 1234 (1938) 9
United States v. National Dairy Products Corp., 372 U.S. 29, 83 S.Ct. 594, 9 L.Ed.2d 561 (1963) 8
Western & S. L. Ins. Co. v. Board of Equalization, 451 U.S. 648, 101 S.Ct. 2070, 68 L.Ed.2d 514 (1981) 4, 9
Whitlock v. Midwest Acceptance Corp., 575 F.2d 652 (8th Cir. 1978) 7
Williams v. United States, 341 U.S. 97, 71 S.Ct. 576, 95 L.Ed. 774 (1951) 8
Williamson v. Lee Optical of Oklahoma, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955) 5

Amendment 14, § 1, Constitution of United States 9
Article III, § 44 Mo. Constitution (1945) 11
15 U.S.C. § 1681a(d) 7
15 U.S.C. § 1602(f) 7
11 U.S.C. § 522(d)(3) 7
11 U.S.C. § 522(f)(2)(A) 7
§ 408.096, RSMo Supp. 1979 ..... 1, 5, 6, 7, 8, 11
§ 408.095, RSMo 1978 6

Notes of the Advisory Committee on the Proposed Rules to F.R.E. 201, subdivision (a) 9
Tussman & TenBroek, The Equal Protection of the Laws, 37 Calif. L.Rev. 341 (1949) 5

No. 82-743

In the Supreme Court of the United States

October Term, 1982

LINCOLN CREDIT CO., et al.,
Appellants,

vs.

GEORGE PEACH, Circuit Attorney of the City of St. Louis, Missouri, et al.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF MISSOURI

MOTION TO DISMISS OR AFFIRM

Appellees, George Peach, the Circuit Attorney of the City of St. Louis and John Ashcroft, the Attorney General of the State of Missouri, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move to dismiss the appeal herein, or in the alternative, that the final judgment and decree of the Supreme Court of Missouri be affirmed on the ground that the questions presented are so unsubstantial so as not to warrant further argument.

STATEMENT

This is a direct appeal from the final judgment and decree of the Supreme Court of Missouri, affirming the judgment of the Circuit Court of the City of St. Louis, upholding the constitutionality of § 408.096, RSMo Supp. 1979 (effective September 28, 1979). Section 408.096 provides:

No person, firm or corporation shall receive or impose any fee or charge, other than one expressly provided for by statute, for arranging credit in the amount of one thousand dollars or less the proceeds of which are intended to be used by the borrower primarily for personal, family or household purposes. Any contract evidencing such excess fee or charge and any note evidencing credit so arranged is void. Any person, firm or corporation who receives or imposes a fee or charge prohibited by this section is guilty of a class B misdemeanor.

Appellants present the following questions:

1. Whether Missouri's statute, V.A.M.S. § 408.096, the effect of which is to make it a crime for an agent of a borrower to charge or receive a fee for arranging credit for the borrower, as Appellants lawfully did prior to the statute, and to make void any promissory note evidencing such credit, while allowing the agent of a lender, under other Missouri statutes, to charge and receive a fee for arranging the same kind of credit with impunity, creates invidious discrimination through a constitutionally faulty classification, without any reasonable relationship to a legitimate state interest, thereby depriving Appellants of their liberty of contract and their property without due process of law, and denying to Appellants the equal protection of the law in violation of Amendment 14, § 1 of the Constitution of the United States?

* * *

2. Whether Missouri's statute, V.A.M.S. § 408.096, which makes it a crime to impose or receive any fee, other than a fee "expressly provided for by statute, for arranging credit in the amount of $1,000.00

or less the proceeds of which are intended to be used by the borrower primarily for personal, family, or household purposes", is so vague and uncertain as to make its application to Appellants constitute a violation of Amendment 14, § 1 of the Constitution of the United States by depriving Appellants of their liberty of contract and their property without due process of law, when the prohibited "arranging credit" requires a determination by Appellants in each credit transaction of what fees are for "arranging" credit, what other statutes contain fees "expressly provided for by statute", and a determination of what "credit" is "intended to be used by the borrower primarily for personal, family or household purposes"?

3. Whether the Missouri summary judgment procedure has been interpreted and applied by the Missouri Supreme Court in such a manner as to deny to Appellants an opportunity to be heard at a meaningful time and in a meaningful manner on material issues in this case, in violation of the due process and equal protection clauses of Amendment 14, § 1 of the Constitution of the United States, particularly by the action of the Missouri Supreme Court in (1) adopting as fact the Appellees' theory of the state interest underlying the enactment of V.A.M.S. § 408.096, when such theory is not supported by anything in the Record on Appeal and thus, under Missouri case precedent, is not entitled to be taken into consideration on appeal; (2) applying a Missouri vagueness test for non-criminal statutes instead of the applicable Federal test for criminal statutes, as briefed by Appellant; and (3) refusing to consider, or ignoring two issues briefed by Appellants, namely, the vagueness of certain statutory provisions, and the violation of substantial property

interests of Appellants arising under Article 3, § 44 of the Missouri Constitution 1945 which requires that "rates of interest fixed by law shall be applicable generally and to all lenders without regard to the type or classification of their business"?

• • •

ARGUMENT

The Case Presents No Substantial Question Not Previously Decided By This Court

I.

Equal Protection
No Invidious Discrimination

The decision of the Missouri Supreme Court is plainly correct. Under the police power of the state, the legislature may prohibit an occupation or calling, whether useful or not. *Ferguson v. Skrupa*, 372 U.S. 726, 83 S.Ct. 1028, 10 L.Ed.2d 93 (1963). It is only necessary that the classification made by the law may be said to be reasonably supported by any conceivable state of facts in that the propriety, wisdom and expediency of legislation enacted pursuant to the police power of the state is a matter for the legislature. *Western & S. L. Ins. Co. v. Board of Equalization*, 451 U.S. 648, 101 S.Ct. 2070, 68 L.Ed.2d 514 (1981); *McGowan v. Maryland*, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed. 2d 393 (1961). State statutes touching upon business and industrial conditions need not be in every respect logically consistent with their aim to be constitutional. It is enough that there is a perceived evil to be corrected and that it might be though that a particular legislative measure is a rational way of doing so. Thus the Supreme Court will not strike down state laws regarding business and indus-

trial conditions merely because they may be unwise, improvident or out of harmony with a particular school of thought. *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955). Nor does the constitution demand a perfect congruence between the classification and the end to be served thereby. Laws may be underinclusive or overinclusive. *Tussman & TenBroek, The Equal Protection of the Laws*, 37 Calif. L.Rev. 341 (1949).

Section 408.096, RSMo Supp. 1979, rests upon a rational basis in that the legislature may have reasonably found that those in need of small loans for personal, family or household purposes are in need of special protection as it was within the legislative prerogative to find that firms and others engaged in the business of arranging credit frequently extort large sums from the poor and uneducated in need of small, personal loans, i.e., those least able to protect themselves from usury, outrageous fees, adhesion contracts and unconscionable bargains. Further, the General Assembly may have found that such firms "string the poor along" from payday to payday, charging outrageous sums under the guise of fees and commissions so that the borrower is forced to borrow again and again in the hope of paying off the loan, thereby creating a system of perpetual indebtedness and servitude.

While it is true § 408.096 is underinclusive in that agents of borrowers are not permitted to charge a fee "for arranging credit in the amount of one thousand dollars or less the proceeds of which are intended to be used by the borrower primarily for personal, family or household purposes", while agents of lenders are allowed to charge up to two percent per month pursuant to § 408.096, RSMo Supp. 1979, the statutory scheme creates no invidious discrimination.

Historically, Missouri has viewed the fees of agents of lenders as interest, while the fees of borrowers' agents have been treated as brokerage fees. *State v. Sargent,* 241 Mo.App. 1085, 256 S.W.2d 265 (Mo.App., St.L.D. 1953); *Allen v. Newton,* 219 Mo.App. 74, 266 S.W. 327 (K.C. 1924); § 408.095, RSMo 1978. Under the police power of the state, the legislature has put a ceiling of two percent interest per month (including the fees of the lenders' agents), while not providing for a fee or commission for the borrowers' agents *in only a very limited class of loans.* Given Missouri's historical classification of lenders' agents' fees as interest and borrowers' agents' fees as brokerage commissions, the legislature may have decided it was too difficult to police borrowers' agents in this limited class of transactions as their fees might not be typically recited in notes, since their fees are not considered interest, whereas the fees of the lenders' agents would be typically recorded and evidenced in the notes as their fees are considered interest. Under this scheme greater protection is given to the poor.

II.

Vagueness

Appellants contend that § 408.096 is unconstitutionally vague because in each credit transaction appellants must determine what fees are for "arranging" credit, which statutes contain fees "expressly provided for by statute" and determine what "credit" is "intended to be used by the borrower primarily for personal, family or household purposes." Appellants' claims are unsubstantial. They were able to plead their conduct was proscribed by § 408.096 and the statute is clear on its face.

The test of whether a criminal statute is unconstitutionally vague is whether the terms of the statute are

so vague that men of common intelligence must necessarily guess at their meaning and differ as to their application. *Connally v. General Construction Co.*, 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322 (1926).

Terms such as "arranging credit" and "primarily for personal, family or household purposes" are no strangers to statutory enactments or to the courts. The phrase "arranges credit" is used in the Truth in Lending Act, specifically in subsection (f) of § 1602 of Title 15 U.S.C. It states in pertinent part: "Notwithstanding the previous sentence, a person who regularly *arranges* for the extension of consumer *credit* . . . is a creditor. . . ." (Emphasis added). Such phrases as "arranges credit" or phrases very similar thereto have also been construed in quite a few cases without any difficulty. See *Whitlock v. Midwest Acceptance Corp.*, 575 F.2d 652 (8th Cir. 1978); *Manning v. Princeton Consumer Discount Co.*, 533 F.2d 102 (3rd Cir. 1976); *Union Mortgage Banking & Trust Co. v. Hagwood*, 97 F. 360 (D.S.C. 1899); *Gerasta v. Hibernia National Bank*, 411 F.Supp. 176 (E.D. La. 1976); *Thompson-Starrett Co. v. Masons' Administrator*, 304 Ky. 764, 201 S.W.2d 876 (1946).

Nor is the phrase "primarily for personal, family or household purposes" unknown to legislative enactments. The Congress has employed substantially similar language in the Bankruptcy Code and in the Fair Credit Reporting Act. Subdivision 3 of subsection (d) and subdivision (f)(2)(A) of § 522 of Title 11 U.S.C. use the phrase "held primarily for the personal, family, or household use. . . ." Similarly 15 U.S.C. § 1681a(d) uses the phrase "to be used primarily for personal, family or household purposes. . . ."

Section 408.096 is no more vague than statutes which have been upheld by this Court—such as the Maryland statute which made it a crime for certain retailers to

sell on Sunday merchandise essential to, or customarily sold at, or incidental to, the operation of bathing beaches and amusement parks, or even the Robinson-Patman Act, which makes it a crime to sell goods at unreasonably low prices for the purposes of destroying or eliminating competition. See *McGowan v. Maryland; United States v. National Dairy Products Corp.*, 372 U.S. 29, 83 S.Ct. 594, 9 L.Ed.2d 561 (1963). Further, it is the policy of this Court to give criminal statutes a narrow construction and limit vagueness arguments to facts actually before the Court, thereby preventing the application of statutes to hypothetical circumstances in which reasonable men might differ. *United States v. National Dairy Corp.; Williams v. United States*, 341 U.S. 97, 71 S.Ct. 576, 95 L.Ed. 774 (1951). In the instant case Appellants merely wish to address hypothetical factual situations to the Court and therefore should not be heard further.

III.

Summary Judgment Procedure Constitutional

Appellants attack the Missouri summary judgment procedure as being unconstitutional in that (1) the Supreme Court of Missouri adopted Appellees' theory of the state interest underlying the enactment of § 408.096, when there are no facts in the record supporting such interest; (2) because the Missouri Supreme Court applied the Missouri vagueness test for non-criminal statutes instead of the applicable federal test, and (3) because the Supreme Court of Missouri failed to address two issues raised by Appellants.

Appellants fail to raise any substantial issues.

A.

State Interest
Adjudicative v. Legislative Facts

In examining legislation under the due process and equal protection clauses of the Fourteenth Amendment, the classification made by the statutes will be upheld if any conceivable state of facts may be said to support the classification. *Western & S. L. Ins. Co. v. Board of Equalization; McGowan v. Maryland.* The facts themselves need not be actual but merely possible. *Adams v. Tanner,*[1] 244 U.S. 590, 37 S.Ct. 662, 61 L.Ed. 1336 (1917) (Brandeis, J. dissenting). This Court has stated:

> "Even in the absence of [reports of legislative committees] the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of legislators."

United States v. Carolene Products Co., 304 U.S. 144, 152, 58 S.Ct. 778, 82 L.Ed. 1234, 1241 (1938) (footnotes omitted).

The Notes of the Advisory Committee on the Proposed Rules to F.R.E. 201 at subdivision (a) define such facts as legislative facts. The Notes state in pertinent part: "Legislative facts . . . are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court in the enactment of a legislative body." As such, such facts need not be proven upon the record.

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1. Overruled by *Ferguson v. Skrupa.*

Therefore, Appellants have failed to assert any substantial question on this point.

B.

Appropriate Vagueness Test

Appellants claim that the appropriate vagueness test for a criminal statute is whether the terms of the statute are so vague that men of common intelligence must necessarily guess at their meaning and differ as to their application. *Connally v. General Construction Co.* Appellees Peach and Ashcroft do not dispute this. However, Appellants claim the Supreme Court of Missouri applied the wrong test.

In its opinion, the Supreme Court of Missouri stated (A-7):

> If the terms or words used in a statute are of common usage and are understandable by persons of ordinary intelligence, they satisfy the constitutional requirement as to definiteness and certainty. Prokopf v. Whaley, 592 S.W.2d 819, 824 (Mo. banc 1980). Where, however, the statutory terms are of such uncertain meaning, or so confused that the courts cannot discern with reasonable certainty what is intended, the statute is void.

While the language employed by the Supreme Court of Missouri may lack the precision of this Court's articulation, the Supreme Court of Missouri has applied the applicable federal test. If the terms or words used in the statute are of common usage and are understandable by persons of ordinary intelligence, then men of common understanding need not guess at their meaning or differ as to their application. Similarly, courts must strike down statutes which employ terms of uncertain meaning or which cannot be discerned with reasonable certainty.

Certainly it would have been better if the Missouri Supreme Court had used the same language as enunciated by this Court, but its mere failure to do so does not give rise to a substantial federal question, particularly in light of the Missouri Supreme Court's entire analysis of the vagueness question.

C.

Failure To Address Issues

Appellants claim the Supreme Court of Missouri failed to address two issues they briefed—(1) the vagueness of certain statutory sections and (2) the violation of Appellants' substantial property interests arising under Article III, § 44 of the Missouri Constitution of 1945.

With respect to Appellants' "substantial property interest arising under Article III, § 44 of the Missouri Constitution," the Missouri Supreme Court specifically considered and denied Appellants' point because it found § 408.096 not to be a special law, and thereby not in contravention of Article III, § 44 (A-8): Having determined that Appellants had no property right under Article III, § 44 of the Missouri Constitution of 1945, no federal constitutional issue remains to be determined as state courts have supreme power to interpret the written and unwritten law of the state, and thus a decision based on a question of state law, even if erroneously determined, does not confer appellate jurisdiction on the United States Supreme Court. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107 (1930).

With respect to Appellants' other contention that the Supreme Court of Missouri failed to address all issues relating to vagueness, the Supreme Court was under no compulsion to do so as the issues were not raised in the trial court. *School District of Kansas City v. Smith*, 111 S.W.2d 167 (Mo. 1937) (A-8-9).

CONCLUSION

Wherefore, Appellees Peach and Ashcroft respectfully submit that the questions upon which this cause depends are so unsubstantial as not to need further argument, and Appellees Peach and Ashcroft respectfully move the Court to dismiss this appeal, or in the alternative, to affirm the judgment entered in the cause by the Supreme Court of Missouri.

Respectfully submitted,

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APPENDIX

APPENDIX A

SUPREME COURT OF MISSOURI
EN BANC

No. 63018

Lincoln Credit Co., et al.,
Appellants,

vs.

George Peach, et al.,
Respondents.

APPEAL FROM THE CIRCUIT COURT
OF THE CITY OF ST. LOUIS

Twenty-Second Judicial Circuit-Division No. 3
HONORABLE MURRY L. RANDALL, Judge

(Filed July 6, 1982)

In 1979, the Missouri General Assembly enacted § 408.096, RSMo Supp. 1979 (effective September 28, 1979). It provides as follows:

> No person, firm or corporation shall receive or impose any fee or charge, other than one expressly provided for by statute, for arranging credit in the amount of one thousand dollars or less the proceeds of which are intended to be used by the borrower primarily for personal, family or household purposes. Any contract evidencing such excess fee or charge and any note evidencing credit so arranged is void. Any person, firm or corporation who receives or imposes a fee or charge prohibited by this section is guilty of a class B misdemeanor.

On September 7, 1979, appellants filed a suit for declaratory judgment in the Circuit Court of the City of St. Louis and sought to have § 408.096 declared void on the grounds that it violated the United States Constitution and the Missouri Constitution.

Appellants' petition stated that they were corporations duly organized under the laws of the State of Missouri for the purpose of arranging credit between a borrower and a third-party lender; that appellants receive a fee for such services; that the loan is usually evidenced by a promissory note between the borrower and the third-party lender; that the effect of § 408.096 was to make unlawful the previously lawful business conducted by appellants because they arrange only loans of $1,000 or less for personal, family or household purposes; that enforcement of § 408.096 would prohibit appellants from collecting the fee charged for arranging loans and would prohibit third-party lenders from collecting money loaned to the borrowers; and that the effect of the statute is to invalidate loans already contracted for and thus to subject appellants to suit by the third-party lenders who loaned money to appellants' clients. Appellants pleaded that § 408.096 violates provisions of the Missouri Constitution and of the United States Constitution. Appellants also requested that the court enjoin George Peach, Circuit Attorney for the City of St. Louis, and John Ashcroft, Attorney General of the State of Missouri, from prosecuting them under the statute.

On September 7, 1979, the circuit court issued a temporary restraining order against defendants Peach and Ashcroft. On September 25, 1979, October 11, 1979, and November 29, 1979, amended restraining orders were entered. On December 13, 1979, all parties consented to an order continuing the last amended restraining order until further court order.

On October 24, 1980, appellants filed a motion for summary judgment which requested the trial court to find that § 408.096 destroyed appellants' business and that it violated both the United States Constitution and the Missouri Constitution.

On March 16, 1981, the trial court entered a summary judgment denying appellants' constitutional attacks on § 408.096. The court held that the statute was not invalid or void, and declared that the temporary restraining order had expired. On March 26, 1981, appellants filed a motion to modify the summary judgment decree, declared their intent to appeal directly to this Court, and requested that the trial court stay that part of the decree which vacated the temporary restraining order pending this Court's disposition of the case. On April 21, 1981, the trial court entered an order which granted that request. Notice of appeal was then filed with this Court.

The basic test to determine whether a plaintiff has standing to bring suit for declaratory and injunctive relief is whether he has a legally protectible interest at stake. Schweig v. City of St. Louis, 569 S.W.2d 215 (Mo. App. 1978). Missouri courts have held that whether a party can lawfully engage in its business under a particular state presents a situation where that party has a legally protectible interest. State ex rel. Eagleton v. McQueen, 378 S.W.2d 449, 452 (Mo. banc 1964). Moreover, such a question constitutes a justiciable controversy under the declaratory judgment act even though no enforcement of that statute has yet been commenced against that party. *Id.*, at 452. Therefore, there is a justiciable controversy here. This Court has jurisdiction because this case involves the validity of a statute of this state. Mo. Const. Art. V, § 3.

Appellants first contend that the trial court erred in failing to declare § 408.096 unconstitutional, as applied to contracts made prior to its effective date, because the statute voids those contracts, criminally punishes appellants for receipt of payments under those contracts, and prohibits future receipt of payments due under them.

As a general rule, statutes operate prospectively. St. Louis County v. University City, 491 S.W.2d 497, 499 (Mo. banc 1973). This rule controls unless the legislative intent that they be given retroactive operation clearly appears from the express language of the act or by necessary or unavoidable implication. *Id.* However, although a statute can operate retroactively, proscriptions exist against retrospective laws, ex post facto laws, and laws that impair contract obligations. Mo. Const. Art. I, § 13; Planned Industrial Expansion Authority of the City of St. Louis v. Southwestern Bell Telephone Company, 612 S.W.2d 772, 775 (Mo. banc 1981). A retrospective law, as that term is used in the Missouri Constitution, is one which impairs existing vested civil rights. Clark v. Kansas City, St. Louis & Chicago Railroad, 219 Mo. 524, 532, 118 S.W. 40, 43 (1909). More specifically, Mo. Const. Art. I, § 13 prohibits subsequent legislation from invalidating contracts lawful at the date of their making. *See* Home Telephone Company v. Sarcoxie Light & Telephone Company, 236 Mo. 114, 132, 139 S.W. 108, 112 (banc 1911). Of course, this constitutional provision has no application in a situation where the law is enacted before the contract is entered into. *See* State v. Laurisden, 312 S.W.2d 140, 143 (Mo. 1958).

An ex post facto law is one which denounces as criminal acts which were non-criminal when committed or which changes penalties for criminal violations after such violations are committed. State ex rel. Jones v. Nolte, 350 Mo. 271, 284, 165 S.W.2d 632, 638 (banc 1942).

In our view, § 408.096 should not and cannot be applied retroactively to invalidate the loan contracts which appellants entered into prior to its effective date. First, there is no express language indicating that it should apply retroactively. Second, application of the law to invalidate the contracts made before its effective date would contravene the constitutional proscription in Mo. Const. Art. I, § 13 against retrospective laws and laws which impair contract obligations. Furthermore, such operation would constitute an ex post facto law because it would make receipt of payments under the contracts criminal whereas when the contracts were made such receipt was not criminal.

A basic maxim of statutory construction requires that a court faced with a constitutional challenge to a statute must, if possible, construe it in favor of constitutionality. Cascio v. Beam, 594 S.W.2d 942, 946 (Mo. banc 1980). Therefore, § 408.096 must be construed to operate prospectively only. So construed, § 408.096 is not unconstitutional for the reasons first urged by appellants.

Appellants next assert that the trial court erred in not finding that § 408.096 deprives them of equal protection of the law as guaranteed by U. S. Const., Amend. 14, § 1, and Mo. Const. Art. I, § 2, and deprives them of property without due process of law as guaranteed by U. S. Const., Amend. 14, § 1, and Mo. Const. Art. I, § 1.

The substantial state interest asserted by the Attorney General to justify the enactment of § 408.096 is as follows:

> "Section 409.096 [sic] must be upheld as the Missouri legislature could have reasonably found that businesses and others engaged in the business of arranging credit frequently extort large sums from

> the poor and uneducated in need of small, personal loans, i.e., those least able to protect themselves from usury, outrageous fees, adhesion contracts and unconscionable bargains. Further, the legislature could have found that such businesses 'string the poor along' from payday to payday, charging outrageous sums under the guise of fees and commissions so that the borrower is forced to borrow again and again in the hope of paying off the loan, thus creating a system of perpetual indebtness [sic] and servitude. Further, the legislature could have found that the industry has for years been notoriously abusive of those in need of quick cash for personal purposes and that strong measures were needed."

In our view, "[a] rational legislature could have based its decision on such considerations." Ross v. Kansas City General Hospital and Medical Center, 608 S.W.2d 397, 399 (Mo. banc 1980). "It is enough that there is an evil at hand for correction, and that it might be thought that . . . [this] particular legislative measure was a rational way to correct it. . . . The prohibition of the Equal Protection Clause goes no further than the invidious discrimination. We cannot say that that point has been reached here." Williamson v. Lee Optical Co., 348 U.S. 483, 488, 489 (1955). We cannot invalidate the underinclusive § 408.096 as unconstitutionally arbitrary.

Appellants' next claim is that the phrase "arranging credit" in § 408.096 is an unconstitutionally vague and uncertain limitation on appellants' businesses, resulting in a deprivation of property without due process of law.

In context, the specified phrase appears as follows:

> No person, firm or corporation shall receive or impose any fee or charge, other than one expressly

provided for by statute, for *arranging credit* in the amount of one thousand dollars or less . . . . (emphasis added.)

If the terms or words used in a statute are of common usage and are understandable by persons of ordinary intelligence, they satisfy the constitutional requirement as to definiteness and certainty. Prokopf v. Whaley, 592 S.W.2d 819, 824 (Mo. banc 1980). Where, however, the statutory terms are of such uncertain meaning, or so confused that the courts cannot discern with reasonable certainty what is intended, the statute is void. *Id.* On a challenge to a statute or ordinance as being unconstitutionally vague it is not necessary to determine if a situation could be imagined in which the language used might be vague or confusing but rather, the language is to be treated by applying it to the facts at hand. *Id.*

"Arrange" is defined in Webster's Third New International Dictionary (1965), as "to put in order beforehand; make preparations for . . . ." In a statute related to § 408.096, "arranged" is defined as "to provide or offer to provide a loan which is or will be extended by another person . . . ." § 408.400(1), RSMo 1978. Although we can find no cases in which the word "arrange" has been construed by courts of this state in the context of a loan or credit transaction, as here, other courts have had such opportunities. *E.g.*, Whitlock v. Midwest Acceptance Corporation, 575 F.2d 652 (8th Cir. 1978); Manning v. Princeton Consumer Discount Company, 533 F.2d 102, 104 (3d Cir. 1976); Union Mortgage Banking & Trust Company v. Hagwood, 97 F. 360, 364 (D.S.C. 1899); Gerasta v. Hibernia National Bank, 411 F.Supp. 176, 178 (E.D. La. 1975); Thompson-Starrett Company v. Masons' Administrators, 201 S.W.2d 876, 880 (Ky. 1946). Despite their different fact patterns, these cases define "arrange" consistently with those definitions set out above.

The facts of appellants' routine business dealings with their clientele are undisputed. In their own pleadings and brief, appellants state that they meet with their clients to *arrange credit*. This involves pledging appellants' credit, in favor of the client, to a third-party lender who actually lends the money. Appellants charge a fee for their services of arranging and guaranteeing the loan. The agreement reached is usually evidenced in a written contract.

No more need be said than that the phrase "arranging credit", as employed in § 408.096, clearly encompasses appellants' acts in obtaining from third-party lenders loans for their customers. The challenged language of the statute is not unconstitutionally vague when examined in light of the facts of this case, and there is no need to attempt to resolve the statute's constitutionality under any hypothetical set of facts. *Prokopf v. Whaley*, 592 S.W.2d at 824. Appellants raise, in their brief, many other allegations regarding the unconstitutional vagueness of certain other phrases in § 408.096. However, these contentions were not presented to the trial court and it has long been stated that this Court will not, on review, convict a lower court of error on an issue which was not put before it to decide. School District of Kansas City v. Smith, 111 S.W.2d 167, 168 (Mo. 1937); Alexander v. Haden, 2 Mo. 211, 212 (1830).

The trial court's finding that the statute was not unconstitutional for vagueness must be sustained.

Appellant's next several points of error hinge upon the allegation that § 408.096 is unconstitutional as a special law. They argue that because § 408.096 is a special law it violates many constitutional provisions, to wit: (1) Mo. Const. Art. XI, § 2, because it amends the corporate charter

of each appellant by special law; (2) Mo. Const. Art. III, § 40(27), which prohibits regulation of trade by special law in that businesses other than appellants are not affected by the prohibitions and penalties of § 408.096; (3) Mo. Const. Art. IV, § 40(28), which prohibits any grant of special or exclusive rights, privileges, and immunities in that other businesses are unaffected by the prohibitions and penalties of § 408.096; (4) Mo. Const. Art. III, § 42, which requires thirty days notice of intention to pass a special law in that such notice was not given; (5) Mo. Const. Art. III, § 44, which prohibits any law fixing rates of interest for any particular group or class engaged in lending money; and (6) Mo. Const. Art. III, § 40(26), which prohibits any special law fixing the rate of interest.

The resolution of the assertion that § 408.096 constitutes a special law is dispositive of all the points raised.

In our view, the assertion is without merit. The statute applies uniformly to all persons, firms or corporations. As indicated *supra*, § 408.096 is not "unconstitutionally arbitrary." It is well-established that "a law is not special if it applies to all of a given class alike and the classification is made on a reasonable basis." Ross v. Kansas City General Hospital and Medical Center, 608 S.W.2d 397, 400 (Mo. banc 1980).

Appellants next urge that the trial court erred in not finding that § 408.096 violates Mo. Const. Art. I, § 13, because it has the effect of making an irrevocable grant of special privileges and immunities to businesses other than appellants in that appellants are affected by the prohibitions and penalties of the statute while other businesses are not. They now assert that the business transactions excepted from § 408.096 are set out in "V.A.M.S. §§ 408.095, 408.140, 408.190, 408.250, 408.300, and 408.400 to 408.415."

Article I, § 13 of the Missouri Constitution provides that no law "making any irrevocable grant of special privileges or immunities, can be enacted." It has been held that the constitutional proscription applies to privileges or immunities granted to "a person or class of persons to the *exclusion of others* and in derogation of common right." State ex inf. Chaney v. West Missouri Power Co., 313 Mo. 283, 297, 281 S.W. 709, 713 (1926). As indicated *supra*, § 408.096 applies uniformly to all persons, firms or corporations. The assertion is without merit.

Appellants next urge that the trial court erred in not finding that the bill, of which § 408.096 was a part, was so amended in its passage as to change its original purpose, in violation of Mo. Const. Art. III, § 21. The constitutional provision upon which appellants rely provides in pertinent part as follows:

> Section 21. *Style of laws—bills—limitation on amendments—power of each house to originate and amend bills—reading of bills.*—No law shall be passed except by bill, and *no bill shall be so amended in its passage through either house as to change its original purpose.* Bills may originate in either house and may be amended or rejected by the other. (emphasis added.)

The title of the original Senate Bill 305 was as follows:

> An Act [t]o repeal sections 408.030, 408.050, 408.060, and 408.070, RSMo 1978, *relating to interest*, and to enact in lieu thereof three new sections relating to the same subject, with penalty provisions. (emphasis added.)

while the title to the Senate Bill 305 actually passed is as follows:

> An Act [t]o repeal sections 408.015, 408.020, 408.030, 408.031, 408.036, 408.052, 408.100, 408.140, 408.200, 408.220, 408.250, 408.255, 408.256, and 408.300 RSMo 1978, *relating to certain credit transactions* and to enact in lieu thereof forty new sections relating to the same subject, with penalty provisions, an effective date covering certain sections, and an emergency clause for a specific section. (emphasis added.)

Appellants' argument here is accurately stated in syllogistic fashion: (1) Mo. Const. Art. III, § 21, prohibits amending any bill through its passage in either house as to change its original purpose; (2) the original Senate Bill 305 solely concerned interest, as evidenced by its title and the statutory sections contained therein; (3) Senate Bill 305, as actually adopted, contains numerous sections which do not relate to interest at all, including § 408.096; (4) therefore, the inclusion of § 408.096 in the adopted Act violated Mo. Const. Art. III, § 21, because it related to a purpose [*i.e.*, credit transactions] different from that of the original bill [*i.e.*, interest]. Appellants also contend that the presence of § 408.096 in only the amended Act violated Mo. Const. Art. III, § 21, because its provisions were new, and concerned a subject different from that in the original bill.

Resolution of the contentions made requires comparison of the purpose of the original Senate Bill 305 and of Senate Bill 305 as actually passed.

Here, as with all challenges to the constitutionality of a statute, there must be facts pleaded in support of the attack, City of St. Louis v. Butler Co., 358 Mo. 1221, 219 S.W.2d 372 (banc 1949), and the burden of proof is on those who attack the statute. Atkins v. Department of Building Regulations, City of Springfield, 596 S.W.2d 426, 434 (Mo. 1980).

The constitutional limitation that no bill may be so amended as to change its original purpose is "designed to prevent the enactment of amendatory statutes in terms so blind that legislators themselves . . . [would be] . . . deceived in regard to their effect, and the public, from difficulty in making the necessary examination and comparison, [would fail] to become apprised of the changes in the laws." State v. Ludwig, 322 S.W.2d 841, 847 (Mo. banc 1959). "Purpose" is the key word in the provision, and it means the general purpose of the bill, not the mere details through which and by which that purpose is manifested and effectuated. Brown-Forman Distillers Corp. v. McHenry, 566 S.W.2d 194, 196 (Mo. banc 1978). The restriction is against the introduction of matter which is not germane to the object of the legislation or which bring about an extension or limitation of the scope of the bill are not prohibited; even new matter is not excluded if germane. *Id.* It is noteworthy that the title of an act, "though performing a most important function, is still not strictly a part of the act proper." State ex rel. Aull v. Field, 119 Mo. 593, 609, 24 S.W. 752, 755 (banc 1894); *see also,* Allied Mutual Insurance Co. v. Bell, 353 Mo. 891, 899, 185 S.W.2d 4, 8 (1945).

Examination of the provisions of the original Senate Bill 305 shows that it is related to a variety of aspects of the same subject matter—credit transactions. For example, sections therein concerned lawful interest rates, causes of action for excessively extracted interest (including damages, costs, and statutes of limitation), negotiability of notes, availability of usury as a defense to the enforcement of a promissory note, etc. These are not different subjects but rather are naturally related in the legislature's attempt to govern credit transactions.

The amendments made to this bill, as evidenced by the text of the finally amended bill which was passed, were

not made in violation of Art. III, § 21. They, like the sections in the original bill, relate to credit transactions. The additions to the original bill do not run afoul of the constitution. Even alterations which would extend the scope of the bill are not prohibited. *Brown-Forman Distillers Corp. v. McHenry*, 566 S.W.2d at 196.

Nor does the change in the bill's title affect its constitutional validity. The title is not a part of the bill and so can be changed without violating Art. III, § 21. *See, State ex rel. Aull v. Field*, 24 S.W. at 755 (Mo. banc 1894). Appellants assert that the amended Senate Bill 305 violated Art. III, § 21, because § 408.096 and other sections do not relate to interest, as the title of the original bill indicated. A study of both bills illustrates that the purpose of both was to govern and regulate credit transactions. The title of the original bill was rightly changed to reflect the real scope of subject matter in the bill. The title of Senate Bill 305, as enacted, is accurate and constitutional.

The provisions of § 408.096 clearly relate to credit transactions and so are properly within the purpose of the bill. This puts to rest appellants' contention that the statute should not be included in Senate Bill 305 on the ground that it did not exist previously.

The trial court's finding that Mo. Const. Art. III, § 21, was not violated must be sustained.

Appellants contend that the title of Senate Bill 305 violates Mo. Const. Art. III, § 23, which provides that "[n]o bill shall contain more than one subject which shall be clearly expressed in its title . . . ." Appellants claim: (1) the bill contains more than one subject, and (2) the bill's title is in fact misleading and deceptive because it (a) gives the impression that the subject matter covered by § 408.096 was covered in previous Missouri

legislation although it was not, and (b) "creates the impression that it merely relates to the regulation of certain credit transactions, and certain penalty provisions, all as covered by legislation being repealed by the bill whereas the legislation has the effect of prohibiting, not just regulating [business] [,] . . . and the legislation not only concerns penalties, but in fact creates civil and criminal liabilities for . . . [appellants] . . . which liabilities never existed under prior Missouri legislation."

The purpose of Art. III, § 23, is to ensure that the title of a bill generally indicates what the act contains so that neither the legislature nor the public is misled. State ex rel. Wagner v. St. Louis County Port Authorities, 604 S.W. 2d 592, 602 (Mo. banc 1980). The title need not express the limitations in the body of the act, but where the title of an act descends to particulars and details, the act must conform to the title as thus limited by the particulars and details. Hunt v. Armour, 345 Mo. 677, 681-682, 136 S.W. 2d 312, 314 (1939). The title to an act will be valid if it indicates the general contents of the act and if the contents fairly relate to and have a natural connection with the subject expressed in the title. *State ex rel. Wagner v. St. Louis County Port Authority*, 604 S.W.2d at 601. Mere generality of title will not prevent the act from being valid, where the title does not tend to cover up or obscure legislation which is in itself incongruous and has no necessary or proper connection with the rest of the act. *Brown-Forman Distillers Corp. v. McHenry*, 566 S.W.2d at 197.

Here, as with other challenges to the constitutionality of a statute, the party on the attack has the burden to show that a constitutional provision has clearly and undoubtedly been contravened. *State v. Weindorf*, 361 S.W. 2d at 809. In this situation appellants need to illustrate what the foreign or unrelated provisions are. *Id.* at 810.

On the state of the record no proof whatsoever has been adduced to support appellants' position. Nevertheless, an attempt will be made to resolve the issues on the language of the title and content of Senate Bill 305.

A case worthy of close examination here is Edwards v. Businessmen's Assurance Co., 350 Mo. 966, 168 S.W.2d 82 (1942). There, appellants complained that an insurance act entitled "An Act to revise and amend the Insurance Laws of the State of Missouri" violated Art. IV, § 28 (now Art. III, § 23) because it included a provision on suicide and its effect on insurance coverage but the title did not mention it, and because there was no existing suicide statute to amend and therefore that provision was a new law. 168 S.W.2d at 92. Appellants argued that if "new and additional laws can be enacted by incorporating them into a bill to revise and amend existing laws, then the purpose of [Art. III, § 23] . . . may be destroyed and circumvented and new and important legislation may be enacted without notice thereof to members of the General Assembly or to the people." *Edwards v. Businessmen's Assurance Co.*, 168 S.W.2d at 92. The Court acknowledged that "[t]he so-called suicide statute first appeared in an act . . . entitled 'An Act to revise and amend the Insurance Laws of the State of Missouri.'" 168 S.W.2d at 92. In rejecting appellants' claim, the *Edwards* court employed the legal principles set out above to find that the title did not violate the constitution by being overbroad or misleading.

The *Edwards* case is sufficiently analogous to the instant case to be dispositive. As in *Edwards*, the title of Senate Bill 305 gives a clear idea of the substantial purpose of the act and the challenged statute is reasonably related to the rest of the bill. The fact that the title omits particular details of the act, such as what prohibitions, etc.,

are included, is not fatal. Moreover, the fact Missouri has never before had, as law, the specific provisions of § 408.096 does not mean that the statute violates Art. III, § 23. The provisions of § 408.096 are neither incongruous, disconnected, nor without natural relation to the rest of the bill, which relates to credit transactions. Therefore, Senate Bill 305 does not contravene Mo. Const. Art. III, § 23, as asserted by appellants.

The denial by the trial court of appellants' contention on this issue must be sustained.

In our view, § 408.096 is constitutional.

The judgment of the trial court is affirmed.

Robert T. Donnelly, Chief Justice

ALL CONCUR.

APPENDIX B

408.096. Loan arrangement excess fee prohibited for certain transactions—penalty.—No person, firm or corporation shall receive or impose any fee or charge, other than one expressly provided for by statute, for arranging credit in the amount of one thousand dollars or less the proceeds of which are intended to be used by the borrower primarily for personal, family or household purposes. Any contract evidencing such excess fee or charge and any note evidencing credit so arranged is void. Any person, firm or corporation who receives or imposes a fee or charge prohibited by this section is guilty of a class B misdemeanor.

(L. 1979 S. B. 305)

APPENDIX C

***408.095. Charging interest of more than two percent per month a misdemeanor, exceptions.**—Every person or persons, company, corporation or firm, and every agent of any person, persons, company, corporation** or firm, who shall take or receive, or agree to take or receive directly or indirectly, by means of commissions of brokerage charges, or otherwise, for the forbearance or use of money or other commodities, any interest at a rate greater than two percent per month, except as permitted by the laws of this state, shall be deemed guilty of a misdemeanor. Nothing herein contained shall be construed as authorizing a higher rate of interest than is now provided by law.

(RSMo 1939 § 4813, A. L. 1974 2d Ex. Sess. S. B. 1) Prior revisions: 1929 § 4421; 1919 § 3680; 1909 § 4892 Effective 1-9-75

*Transferred; formerly 563.800

**Word "corporations" appears in original rolls.